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No. 83-6766

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOE HAYES, *Petitioner*,

v.

FLORIDA, *Respondent*.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

WHETHER DAVIS V. MISSISSIPPI, 394 U.S. 721 (1969), PROHIBITS A WARRANTLESS, NON-CONSENSUAL DETENTION OF A CITIZEN, UNDERTAKEN WITHOUT PROBABLE CAUSE, FOR THE PURPOSE OF OBTAINING THE CITIZEN'S FINGERPRINTS FOR COMPARISON WITH PRINTS FOUND AT THE SCENE OF A CRIME, AND WHETHER TERRY V. OHIO, 392 U.S. 1 (1968), MAY BE EXTENDED TO PERMIT SUCH DETENTIONS.

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OPINIONS BELOW

The opinion of the district court of appeal of Florida, second district, affirming Petitioner's convictions of burglary and sexual battery is reported as Hayes v. State, 439 So.2d 896 (Fla. 2d DCA 1983) review denied 447 So.2d 886 (Fla. 1984)(J.A. 32-44).

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3) and Rule 17(1)(c), United States Supreme Court Rules. Throughout this litigation, Joe Hayes has asserted a deprivation of his rights as guaranteed by Amendments IV and XIV, United States Constitution.

On September 16, 1983, the judgment of the district court of appeal of Florida, second district was entered. Rehearing was denied on November 2, 1983. On March 22, 1984, the Florida Supreme Court

denied a petition for discretionary review. This Court granted Joe Hayes' petition for writ of certiorari on Monday, October 1, 1984. __U.S.__, 83 L.Ed.2d 30.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

This case more specifically involves the Fourth Amendment to the Constitution of the United States which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case and history of the case as there is no disagreement as to the factual representations.

SUMMARY OF THE ARGUMENT

The Florida circuit court denied Joe Hayes' motion to suppress without making specific findings as to probable cause or voluntariness. J.A. 26. The Florida court of appeals concluded police did not have probable cause to arrest Joe Hayes prior to taking his fingerprints. J.A. 34. The Florida appellate court did not hold that Joe Hayes freely and voluntarily submitted to detention; rather, the court stated that it was highly questionable that Joe Hayes accompanying the officers to the police station could be considered voluntary. J.A. 33. The opinion of the Florida court of appeals

addresses the question this Court left open in Davis v. Mississippi, 394 U.S. 721 (1969).

Joe Hayes was detained solely for the purpose of securing fingerprints. He was not interrogated; and, he was detained no longer than reasonably necessary to secure the fingerprint impressions for comparison purposes. Florida argues that such a minimal intrusion upon Joe Hayes under these narrow facts and circumstances did not infringe any of his Fourth Amendment rights. Concededly, there was an investigative confrontation when Joe Hayes opened his door to police and ultimately accompanied them for the exclusive purpose of securing fingerprints. This detention and/or seizure is reasonable under the Fourth Amendment. Florida's legitimate interest in solving a violent crime outweighed Joe Hayes' interest in privacy as defined by

the Fourth Amendment. Under these narrow facts and circumstances, this position is not an illogical extension of Terry v. Ohio, 392 U.S. 1 (1968).

On alternate constitutional grounds, Justice Stewart's dissent in Davis v. Mississippi, 394 U.S. 721 (1969) has gained contemporary constitutional recognition. There is probable cause now to arrest Joe Hayes for the rape of Julianne Hollander. The victim gave positive in-court identification of petitioner. Joe Hayes is subject to being re-arrested; booked; and, fingerprinted. These fingerprints would be admissible in evidence. Additionally, once police had compared the herringbone pattern tennis shoes with the shoe prints left at the rape scenes, probable cause would have existed to arrest Joe Hayes and, as a concomitant, his fingerprints would have been secured. In

Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984), this Court recognized an "inevitable discovery" exception to the exclusionary rule. On this record, Florida has demonstrated that Joe Hayes' fingerprints would have been obtained inevitably. Assuming police misconduct, and none is present, there is no basis to have kept the fingerprint evidence from the jury. Under this independent line of investigation, Florida and Joe Hayes are placed in the same position had there been no police misconduct. The prosecution has no advantage from a purported Fourth Amendment deprivation; and, Joe Hayes has suffered no prejudice. Both Florida and Joe Hayes are placed in the same positions they would have occupied but for the purported impermissible police conduct. The inevitable discovery rule bars setting aside convictions that would have been obtained

without police misconduct.

A. THE NATURE AND SCOPE OF THE PROTECTION AFFORDED BY DAVIS V. MISSISSIPPI.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(1791)

The Fourth Amendment protects people, not places. This protection is recognized in Davis v. Mississippi, 394 U.S. 721 (1969). John Davis was convicted and sentenced in the Mississippi state court for the rape of an 86 year old woman. John Davis was a black youth and his victim a white geriatric. The crime was committed on December 2, 1965, and John Davis was indicted in May of 1966. When police investigated the

crime scene, they were able to life a palm print and fingerprints from the victim's window and window sill. The hospitalized victim informed police that the rapist was a Negro youth. At that time, the victim did not make a positive identification of John Davis. On the day following the rape and until the day John Davis was indicted, the Meridian, Mississippi police interrogated between 65 to 70 Negro youths, including John Davis. John Davis was taken to the local police station for interrogation and fingerprinting on December 3rd (the day following the crime). John Davis was questioned by police numerous times at his home, in a car, and at city hall. Additionally, 23 other Negro youths were detained for questioning and fingerprinting in connection with the rape. The fingerprints of John Davis and the other 23 suspects were forwarded to the Washington,

D.C. headquarters of the Federal Bureau of Investigation for study and comparison. John Davis' fingerprints were positively identified.

Both in the Mississippi appellate court and in this Court, John Davis argued his fingerprints were taken while he was illegally under arrest and without benefit of counsel. This Court, per Justice Brennan, held that the prints should have been excluded as the fruits of a seizure of John Davis in violation of the Fourth Amendment. The 6-2 majority of the Court, through Justice Brennan, excluded the fingerprints as the product of an unlawful detention. Davis v. Mississippi, supra at 728. See, Wong Sun v. United States, 371 U.S. 471, 486 fn 12 citing Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958). However, Justice Brennan intimated that a detention for such purpose might be per-

missible on evidence insufficient for arrest. The question continues to remain open and was then not reached in Davis on this basis:

> We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. For it is clear that no attempt was made here to employ procedures which might comply with the requirement of the Fourth Amendment: the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer; petitioner was unnecessarily required to undergo two fingerprinting sessions; and petitioner was not merely fingerprinted during the December 3rd detention but also subjected to interrogation.
>
> (text of 394 US at 728)

In the concurrence of Justice Harlan, he noted: "There may be circumstances, falling short of the 'dragnet' procedures employed in this case, where compelled sub-

mission to fingerprinting would not amount to a violation of the Fourth Amendment even in the absence of a warrant, and I would leave that question open." Davis v. Mississippi, supra at 728.

Justices Black and Stewart dissented. Although Justice Stewart agreed that John Davis was arrested and detained without probable cause, he dissented in Davis on the ground that "Fingerprints are not 'evidence' in the conventional sense that weapons or stolen goods might be. Like the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man." Id. at 730.

The range of operation of Davis does not encompass the question of detention solely for the purpose of obtaining fingerprints. This Court did not need to decide that question because, under the

facts of that case, it was unnecessary to do so. The questioning of Joe Hayes and the taking of his fingerprints were not part of a "dragnet" operation of the type conducted in Davis. In Davis, this Court held that fingerprints evidence was inadmissible as the Mississippi police has interrogated John Davis in addition to merely taking his fingerprints. This Court invited resolution of the question in Dunaway v. New York, 422 U.S. 200 (1979). Justice Brennan in an analysis of Davis v. Mississippi again confirmed that detention for purposes of the Fourth Amendment continues to require probable cause regardless as to whether the detention occurred during the investigatory rather than the accusatory stage of the investigation. However, Dunaway recognized the unanswered question as to whether police may detain on less than

probable cause when the sole purpose of the detention is to take fingerprints. Justice Brennan points out in the Dunaway majority opinion:

> In Davis, however, the Court found it unnecessary to decide the validity of a "narrowly circumscribed procedure for obtaining" the fingerprints of suspects without probable cause--in part because, as the Court emphasized, "petitioner was not merely fingerprinted during the... detention but also subjected to interrogation.
>
> (text of 442 U.S. at 215)

Florida argues the nature and scope of the protection afforded by Davis v. Mississippi is limited to those Fourth Amendment encounters where an individual is seized and interrogated. There fingerprinting is a concomitant to the police interrogation and results in a constitutional deprivation. The intent and purpose of Davis v. Mississippi hits its mark; however, the target of a detention to take fingerprints (without interrogation) is not

within the orbit of the Davis v. Mississippi holding.

Fingerprints do fall into an entirely different category from testimonial communications obtained under interrogation. The privilege against self-incrimination under the Fifth and Fourteenth Amendment does not operate to proscribe what was done here. In Schmerber v. California, 384 U.S. 757 (1966), the defendant was convicted of driving an automobile while intoxicated. While receiving treatment at the local hospital for injuries sustained, defendant was arrested and hospital personnel were directed by the police to draw blood. Armando Schmerber objected urging the attendant circumstances gave rise to a due process violation. The blood sample (evidencing intoxication) was admitted into evidence and affirmed in state court on appeal. This Court

affirmed the California appellate court as the taking of the blood sample and the introduction into evidence of the chemical analysis did not violate defendant's Fourth, Fifth, or Fourteenth Amendment rights.

More recently, this Court reviewed a matter where a taxpayer was summoned by the Internal Revenue Service to appear and produce a handwriting exemplar. The district court held the summons should be enforced; but, on appeal, the eight circuit denied enforcement. This Court reversed. United States v. Euge, 444 U.S. 707 (1980). Although Section 7602 of the Internal Revenue Code which authorizes the IRS to summon individuals to "appear" and "to produce such books, papers, records, or other data, and to give testimony" as might be relevant to a tax investigation inherently including the authority to com-

pel handwriting exemplars. This Court pointed out the policy reasons for enforcement absent express statutory prohibition or countervailing congressional policy. Specifically, this Court observed that handwriting exemplars are neither a search or seizure under the Fourth Amendment or Fifth Amendment. Id., at 718. In dissent, Justice Brennan (with whom Justice Marshall and Justice Stevens joined) points out in a separate opinion in footnote 2:

> The Court's use of the label "nontestimonial" is meaningful, for "[t]estimony properly means only such evidence as is delivered by a witness..., either orally or in the form of affidavits or depositions." Black's Law Dictionary 1324 (5th ed 1979). Testimony is a statement of knowledge or belief by a witness as opposed to the mere display of a physical characteristic.
>
> (text of 444 U.S. at 720)

Authority for this holding is found in United States v. Dionisio, 410 U.S. 1

(1973) and United States v. Mara, 410 U.S. 19 (1973). In the former, this Court held that a grand jury witness's Fourth Amendment rights were not violated when he was compelled to furnish a voice exemplar. Thus, a preliminary showing of "reasonableness" was not required. There Justice Stewart reflecting on Davis v. Mississippi noted: "Rather, this [voice exemplars] is like the fingerprinting in Davis, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.'" United States v. Dionisio, 410 U.S. 1, 15 (1973). In the latter, United States v. Mara, 410 U.S. 19, 20 (1973), this Court reasoned that "[h]andwriting, like speech, is repeatedly shown to the public, and there

is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice." Every individual (when touching an object) leaves smudges and smears displaying fingerprint impressions which are continually exhibited to the public.

Most recently, in South Dakota v. Neville, 459 U.S. 553 (1983), Justice O'Connor in writing for the majority held a drunk driver's refusal to take a blood alcohol test may be used against him at trial without violating his Fifth Amendment rights. The driver's refusal involved no impermissible coercion on the part of law enforcement; and, thus, there was no constitutional deprivation.

Here, Joe Hayes was transported to the police station for the limited purpose of taking fingerprints. He was detained no longer than it took to take the finger-

print impressions and conclude a match. An expert was waiting, on stand by, to compare the fingerprints. At that point, Joe Hayes was arrested. (State Court record 513).

In no way does the holding in Hayes v. State, 439 So.2d 896 (Fla. 2d DCA 1983) travel outside the scope of Davis v. Mississippi. The taking of fingerprints is neither testimonial nor, as discussed infra, is there a reasonable expectation of privacy on the part of Joe Hayes in his fingerprints.

B. HAYES V. STATE: DAVIS EXCEPTED, TERRY EXTENDED

Terry v. Ohio, 392 U.S. 1 (1968) recognized for the first time that Fourth Amendment seizures of persons must be based on probable cause. This Court declined to stretch the concept of "arrest" --and the general rule requiring probable cause to make arrests "reasonable" under

the Fourth Amendment to stop-and-frisk intrusions as they are the rule of police conduct. Id., at 20. Under the Fourth Amendment, the Terry Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and detection and in the police officer's safety. Id., at 22-27. "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." Id., at 1. Concededly, this case contains an expressed intention of the police to arrest Joe Hayes if he did not accompany them to police headquarters. J.A. 20; 439 So.2d 896, 898. Significantly, the state appellate opinion states: "It is ...highly questionable that appellant's accompanying the officers to the station could be considered voluntary." 439 So.2d at 898. The state trial court denied the

motion to suppress without making specific findings as to voluntariness. J.A. 26. Whether consent to search is voluntary is a matter to be determined from a totality of the circumstances; and, an individual need not be informed of his right to decline consent. See, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). That an individual is given options does not negate the volitional nature of consent. Florida does not abandon its argument that Joe Hayes voluntarily accompanied police for fingerprinting. But, this case is free of a show of physical authority. Initially, the officer asked Joe Hayes if he would accompany the police to headquarters for questioning, and petitioner responded he would. J.A. 19; State court trial record 483-484. Joe Hayes then vacillated. J.A. 19. Joe Hayes was not told that he was under arrest or in custody; and, he was

not warned not to resist or flee. No weapons were displayed and Joe Hayes was not handcuffed. There is no testimony nor suggestion that Joe Hayes was touched or held during the trip to police headquarters. The Florida appellate court suggested Hayes to be seized because of the statement by the investigating officer to Hayes mentioning arrest as a possibility. J.A. 12; 439 So.2d 896, 898. Although not clear within the motion to suppress transcript (J.A. 8-26), the state court trial record indicates that police had interviewed two other rape victims. From these interviews, Joe Hayes became the target. This testimony was excluded at trial as a prophylactic measure so that there would be no violation of §90.404(2)(a), Florida Statutes (1979). (State Court Trial Record 486-487).

In Dunaway v. New York, 442 U.S. 200, 224 (1979) Justice Rehnquist (with whom The Chief Justice joins) points out in footnote 1:

> Neither Davis v. Mississippi, 394 U.S. 721...(1969), nor Brown v. Illinois, 422 U.S. 590 (1975), which the Court treats as departure for today's opinion, support the Court's conclusion that petitioner was "seized" within the meaning of the Fourth Amendment. In Davis, the State made no claim that Davis had voluntarily accompanied the police officers to headquarters. 394 U.S., at 726... Similarly, in Brown there would be no reasonable disagreement that the defendant had been "seized" for Fourth Amendment purposes.

On this sub-point, Joe Hayes ignores the plain, restrictive language of the state court opinion:

> However, this decision should not in any way be construed as giving law enforcement officers carte blanche to fingerprint every person suspected of committing a crime currently under investigation. We hold only that under the narrow facts of this case, the government's legitimate interest in law enforcement, specifically,

> solving of a violent crime, outweighed appellant's interest in privacy as defined by the fourth amendment.[3/] The initial seizure of appellant was reasonable as was the seizure of his fingerprints. As we have earlier stated, the seizure of the tennis shoes presents no fourth amendment problems.
>
> [3/] Although we have not discussed it, obviously the fourth amendment is made applicable to the states by operation of the fourteenth amendment.

See, J.A. 44; 439 So.2d 896, 903-904. The restrictive language of the opinion makes it applicable to only a narrow class of cases. From a doctrinal position, there has been no extension of Terry in the Florida court.

C. THE FALLACY OF THE FLORIDA COURT'S EXPANSION OF TERRY V. OHIO

There is no federal constitutional deception or error in the Florida appellate opinion.

In Terry v. Ohio, 392 U.S. 1 (1968), this Court held that law enforcement term "stop and frisk" is within the orbit of the Fourth Amendment. The person who is approached and spoken to by a policeman and is denied the right to walk away, is a seized person. Earlier, this Court taught in Henry v. United States, 361 U.S. 98 (1959) that once a suspect is taken into custody or otherwise deprived of his freedom of action in any significant way, he is "under arrest." In Henry, after twice observing cartons being loaded into a car, FBI agents who were investigating thefts of interstate liquor shipments stopped the car in which two individuals were riding. A resultant search of the car revealed stolen radios. The individuals were then placed under formal arrest. This Court held that the arrest occurred when the agents stopped the car, pointing out "the

officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete" and finding an absence of probable cause, the search was held illegal. See, Dunaway v. New York, 442 U.S. 200 (1979). Whether there is an arrest depends on an evaluation of all the circumstances. United States v. Beck, 598 F.2d 497, 500-502 (9th Cir. 1979). Cooperation with police to allay, quiet, calm, or diminish suspicions does not constitute an arrest. Oregon v. Mathiason, 429 U.S. 492 (1977).

The Florida appellate court observed the police were prepared to arrest Joe Hayes if he declined to cooperate. J.A. 33; 439 So.2d 896, 898. Joe Hayes informed police that he would rather go to the police station than be arrested. Id. The testimony elicited at the hearing on the motion to suppress indicates that Joe

Hayes was informed he would be arrested if he did not accompany police for fingerprinting. J.A. 12; 19; 20.

When the probable cause requirement of the Fourth Amendment is not reflected in the facts of a case, the court then examines all the attendant facts and circumstances involved to determine whether police intrusion was reasonable for Fourth Amendment purposes. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

In Illinois v. Gates, __U.S.__, 76 L.Ed.2d 527 (1983) this Court adopted a practical, common-sense approach to probable cause applications for search warrants: "...probable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." 76 L.Ed.2d at 544. Justice Rehnquist in writing for the

majority relied on Brinegar v. United States, 338 U.S. 160, 175 (1949): "In dealing with probable cause, ...as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." So that there was no misunderstanding as to the impact of Illinois v. Gates, __U.S.__, 76 L.Ed.2d 527 (1983) this Court summarily reversed the Massachusetts Supreme Judicial Court in Massachusetts v. Upton, __U.S.__, 35 CrL 4044 (1984) holding that Gates rejected Aguilar v. Texas, 378 U.S. 108 (1969) and Spinelli v. United States, 393 U.S. 410 (1969) as being hypertechnical.

Although Gates is directed to Fourth Amendment treatment of applications for search warrants, its language sets the

definitional bounds for probable cause. Probable cause requirements are fluid. Petitioner's attack continues to ignore that in undertaking an examination as to whether police intrusion is reasonable for Fourth Amendment purposes, the state court must compare and balance the competing interests involved. See, Camara v. Municipal Court, 387 U.S. 523 (1967). In this case, that balance was struck in favor of Florida in solving a violent crime. As no interrogation ensued, the seizure or detention of Joe Hayes was reasonable under the Fourth Amendment. J.A. 12-13; 439 So.2d at 899. The state appellate court opinion satisfies the underpinnings of Terry v. Ohio. There is no fallacy in the Florida appellate opinion. It is constitutionally sound.

This past term, the Court has rendered three (3) doctrinal expectation of privacy

decisions which have a bearing on the case at hand. United States v. Jacobsen, __U.S.__, 80 L.Ed.2d 85 (1984); Oliver v. United States, __U.S.__, 80 L.Ed.2d 214 (1984); and, United States v. Karo, 468 U.S.__, 82 L.Ed.2d 530 (1984). In Oliver, police entered private property passing a locked gate and a no trespassing sign and found a crop of growing marijuana. Justice Powell relying on Justice Holmes' statement in Hester v. United States, 265 U.S. 57 (1924) reiterated that the Fourth Amendment's protection accorded to "persons, houses, paper, and effects" does not extend to open fields. Internal reliance was placed on the principles regarding privacy rights expressed in Katz v. United States, 389 U.S. 347 (1967). Not all an individual's subjective expectations of privacy are protected. Rather, only "those expectations that society is

prepared to recognize as 'reasonable.'" A broad definition was applied to "open fields." Joe Hayes had no expectation of privacy in his tennis shoes left in plain and open view on his porch; and, as argued, there is no reasonable expectation of privacy in fingerprints. As in open fields, there is no expectation of privacy as to what is left to plain and open view on the porch of a house.

Prior to Oliver, this Court in Jacobsen held constitutional the warrantless "chemical field test" of suspected narcotics. The contraband had been discovered by employees of Federal Express when examining a damaged package for insurance purposes. Justice Stevens explained that the Fourth Amendment is implicated in such a situation when the governmental intrusion exceeds the scope of the antecedent private search. Justice

Stevens also defined expectations involving both a "search" and "seizure": "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property." United States v. Jacobsen, 80 L.Ed.2d at 94. Justice Stevens addressed the fact that the field test required the destruction of a trace amount of the lawfully-detained powder did not render this "seizure" unreasonable as it "could, at most, have only a de minimis impact on any protected property interest." Here, the police did not destroy the epidermal ridge patterns comprised of the arches, loops, and whorls found on Joe Hayes' fingerprints.

In United States v. Karo, 468 U.S.__, 82 L.Ed.2d 530 (1984), this Court held that the warrantless monitoring of a "beeper" in a container of chemicals after it had been inadvertently taken into a residence constituted a Fourth Amendment deprivation. From a doctrinal stance, the Karo decision stresses this Court's continuing view that society has a reasonable expectation of privacy in residences. Here, Joe Hayes' home was never entered.

Against this authority, the question left open in Davis v. Mississippi closes against Joe Hayes causing no discord within the Fourth Amendment's sense of propriety, order, and fair play. Several questions must be posed. Did the seizure of Joe Hayes for the limited purpose of taking his fingerprints result in a meaningful interference with his possessory interests in his property--here finger-

prints. Significantly, in United States v. Jacobsen, __U.S.__, 80 L.Ed.2d 85, 102 (1984), Justice Stevens pointed out that a field test which required destruction of a trace amount of contraband did not render the seizure unreasonable as it "could, at most, have only a de minimis impact on any protected property interest." As recognized in Davis v. Mississippi, fingerprints have unique characteristics. They do not change because they are "lifted" or "impressed".[1/] The taking of a fingerprint

1/ After the fourth month of the development of the fetus, there appears to be no change in ridge patterns during the life of the individual, although environmental factors such as scars, which are easily recognized, may appear to affect the pattern. See, Fingerprint Identification by Manuel E. Nestle, 36 POF 2d p. 294.

impression does not destroy the epidermal fingerprint ridge patterns; nor, does Joe Hayes claim such destruction. Thus, has there been a meaningful interference with the ridge patterns of Joe Hayes' fingerprints? Common-sense answers the question —no.

Specifically, what are an individual's expectation to privacy rights in fingerprints? When born, a hospital does not secure parental consent to fingerprint the infant. Has the Fourth Amendment been violated? Between birth and death, an individual leaves fingerprint and palmprint impressions as smears and smudges on every item touched during the course of a day's activities. Recognizing this fact, the state of Florida uses its police power to require fingerprinting for varying pro-

fessions and occupations.[2] See, Validity of statutes, ordinance, or regulation requiring fingerprints of those engaging in specified occupations. 41 ALR 3d 732.

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[2] License applicants for alcoholic beverages (§561.17, Fla. Stat.)
Bar applicants for attorney-at-law (§545.026, Fla. Stat.)
Bail bondsmen and runners (§648.34, Fla. Stat.)
Cigarette wholesale dealers & exporters (§210.15, Fla. Stat.)
Correctional officers (§§943.13, 943.14, Fla. Stat.)
Criminal Defendants (§§921.241, 30.31., 943.051, 39.031, 812.014, 921.242, Fla. Stat.)
Permit applicants for explosives (§552.092, Fla. Stat.)
Farm Labor contractors (§450.33, Fla. Stat.)
Registration requirement for felons (§775.13, Fla. Stat.)
Firefighters (§633.34, Fla. Stat.)
Horse show promoters (§535.21, Fla. Stat.)
License applicants for investigative & patrol services (§493.309, Fla. Stat.)
Law enforcement officers (§§943.13, 943.14, Fla. Stat.)
Mortgage brokers & solicitors (§494.04, Fla. Stat.)
Seller's thumbprint for precious metal sales (§538.011, Fla. Stat.)

It cannot be argued, nor does Joe Hayes urge, that the taking of a fingerprint impression reaches a level of privacy expectation as reflected in the removal of blood samples; removal of hair samples; removal of urine samples; swabbing or scraping tissue; use of stomach pump, emetic and/or laxative; rectal cavity search; vaginal cavity search; and, artificial limb search. See, Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force. 66 ALR Fed 119-

3 cont./
Racing permit holders (§550.181, Fla. Stat.)
Real estate brokers & salesmen (§475.175, Fla. Stat.)
Real estate school instructors (§475.451, Fla. Stat.)
Securities dealers (§517.12, Fla. Stat.)
Sensitive & special trust positions for state employees (§110.1127, Fla. Stat.)
Subdivided land sales registrants (§498.031, Fla. Stat.)

164. It is in these matters, more critical Fourth Amendment questions are posed.

D. THE ABSENCE OF A CONSTITUTIONALLY ACCEPTABLE ALTERNATIVE JUSTIFICATION FOR THE HOLDING IN HAYES V. STATE

Joe Hayes ignores an acceptable constitutional alternative which justifies the Florida court of appeals opinion. As predicate to the "alternative", if there is neither a reasonable expectation of privacy in fingerprints nor a meaningful intrusion into Joe Hayes' possessory interests in his fingerprints, the detention must be addressed.

This Court decided Florida v. Royer, __U.S.__, 75 L.Ed.2d 229 (1983) on March 23, 1983. The Joe Hayes case was argued before the Florida appellate court on March 28, 1983; and, the opinion was rendered on September 16, 1983. The Royer opinion was never submitted to that court. In Royer, speaking for a four-Justice

plurality, Justice White found a suspect's consent to search luggage at a Miami airport tainted by an illegal detention. Royer's actions matched security's drug courier profile. Airport security was justified in temporarily detaining Mark Royer and his luggage while attempting to dispel their suspections under Terry v. Ohio, 392 U.S. 1 (1968). However, airport security retained Royer's airline ticket and driver's license; Mark Royer was requested to accompany airport security (along with his luggage) to a private office without being informed he was free to leave. At this juncture, the plurality held that airport security had exceeded any right they had to detain Mark Royer under Terry. Justice White also explained that the airport security agents' conduct "was more intrusive than necessary to effectuate an investigative detention"

under Terry. Although airport security was justified in detaining Mark Royer, the plurality (through Justice White) concluded airport security was more interested in Mark Royer's luggage than in conversation with Mark Royer. Justice Rehnquist in dissent (joined by The Chief Justice and Justice O'Connor) concurred in the plurality conclusion that airport security had grounds for a temporary detention; however, the dissent urged airport security's subsequent actions in terms of "reasonableness" fell within constitutional bounds. Later, in United States v. Place, __U.S.__, 77 L.Ed.2d 110 (1983), on similar facts (where the suspect was not detained; but, his luggage was), it did not violate the Fourth Amendment for a trained dog to verify narcotics contained in a passenger's luggage. However, detaining the luggage for 90-minutes was held unrea-

sonable. The emerging question, for Fourth Amendment purposes, continues to be whether under Terry the seizure be reasonable. Here, a fingerprint expert was on "stand by" to compare the fingerprints. J.A. 19. Joe Hayes' detention was to last long enough to compare the fingerprints; and, if they did not match, Joe Hayes was to be taken home. J.A. 13. Joe Hayes was detained no longer than necessary to obtain his fingerprints and compare them with the ones found at the rape scene.

Building on these decisions, Justice Rehnquist (writing for the majority) in Immigration and Naturalization Service v. Delgado, __U.S.__, 80 L.Ed.2d 247 (1984), held "factory surveys" where illegal aliens sometimes comprise a work force pass Fourth Amendment standards. The same question continues to emerge. When does an "encounter" with law enforcement become

a detention and/or seizure? Here, this Court found that in Delgado the INS conducted their survey with employer's consent. Agents were stationed at the building's exits while the interrogating, armed agents walked throughout the factory displaying their badges. They inquired about citizenship and requested production of immigration papers. There existed discord between United States v. Mendenhall, 446 U.S. 544 (1980) and Florida v. Royer, __U.S.__, 75 L.Ed.2d 229 (1983). In the former, Justice Stewart (in a plurality opinion joined by Justice Rehnquist and joined in part [all but Part II-A] by The Chief Justice, Justice Blackmun, and Justice Powell) voiced:

> "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a

> seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."
>
> (text of 446 U.S. at 554)

The focus in Delgado was shifted from Mendenhall to Royer. In the latter case, police questioning by itself is unlikely to result in a Fourth Amendment violation. If a citizen declines to answer (and additional steps are taken by police to secure answers) the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure. See, Florida v. Rodriguez, __U.S.__, 36 CrL 4086 (U.S. Nov. 13, 1984) describing consensual encounters and articulable basis for detention. Here, Joe Hayes initially consented to accompany police. Police inquired if arrest was necessary

and Joe Hayes then stated he would go voluntarily. No threats or coercion were used. That Joe Hayes was given a choice, under these circumstances, does not render his consent involuntary. The Florida trial court made no specific findings as to voluntariness of consent. J.A. 26. The Florida appellate court found the voluntariness of the consent highly questionable. J.A. 33; 439 So.2d at 898.

The amplified Terry trend is reflected in Adams v. Williams, 407 U.S. 143 (1972) which extended the Terry holding to an investigative stop based on an informant's report rather than on a police officer's own observations. This Court announced an exception to the probable cause requirement in United States v. Brignoni-Ponce, 422 U.S. 873 (1975) by permitting border patrols to detain vehicles that they suspected of containing illegal aliens. The

detention is to be reasonable and for only so long as it takes to enforce the immigration laws. Then in Michigan v. Summers, 452 U.S. 692 (1981), law enforcement lacked probable cause to arrest an individual before the search of a house pursuant to a warrant. This Court upheld the detention of the individual while the search was conducted. Unlike Royer v. Florida, __U.S.__, 75 L.Ed.2d 229 (1983), the seizure of Joe Hayes was brief. Police had an individual on stand by to process the prints. The detention was as brief as humanly possible. Joe Hayes was detained for the brief period of time it took to transport him to the police station; secure his fingerprints; and, view the fingerprint comparison.

On alternate constitutional grounds (against these recent holdings), an appli-

cable deus ex machina of affirmance is gleaned from Justice Stewart's dissent in Davis v. Mississippi, 394 U.S. 721 (1969) and this Court's recent decision in Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984). The dissent of Justice Stewart came to pass:

> At the original trial the victim of the rape, under oath, positively identified the petitioner as her assailant. There now exists, therefore, ample probable cause to detain him and take his fingerprints.
>
> (text of 394 U.S. at 730)

As predicted by Justice Stewart, John Davis was convicted on retrial. Davis v. State, 255 So.2d 916 (Miss. 1971), cert. denied, Davis v. Mississippi, 409 U.S. 855 (1972). In Davis v. Mississippi, 394 U.S. 721 (1969), John Davis asserted that identity would never had been known but for the unlawful arrest/detention/seizure. The second conviction was affirmed because the victim was able to identify John Davis

without the use of any evidence which evolved from the unlawful arrest. In the case at bar, Julianne Hollander (the victim: a 51 year-old female bank teller), gave graphic testimony as to Joe Hayes' statements: "I want to feel your cunt" and "One scream out of you, lady, and you're dead." (State Court Record 283). Mrs. Hollander testified as to both vaginal and anal penetration. (State Court Record 283, 284). The victim made positive in-court identification of Joe Hayes (State Court Record 287). So it follows here, as in Davis v. State, 255 So.2d 916 (Miss. 1971), retrial shall, without question, result in a second conviction!

This clairvoyance by Justice Stewart was embodied in Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984). An "inevitable discovery" exception to the exclusionary rule (where a right-to-counsel violation

exists) applies to Fourth and Fifth Amendment claims. In Brewer v. Williams, 430 U.S. 398 (1977) collateral relief was granted; but, this Court suggested that, despite suppression of defendant's statements, evidence of the location and condition of the victim's body might be admissible on retrial based on inevitable discovery.

The Chief Justice (writing for the majority) focused on the "independent source doctrine". That doctrine "teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred." Id. at 387. In footnote 4 of Nix, the intent, aim, and

object of the opinion is stated: "The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct." Id. at 387, fn 4. The Chief Justice goes on to point out:

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct.
>
> (text of 81 L.Ed.2d at 389, 390)

In dissent, Justice Brennan (with whom Justice Marshall joins) recapitulates the

majority holding: "...the Court concludes that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred." A preponderance of the evidence standard was used for the "inevitable discovery" determination. Id. at 384.

On this record, if there were a Fourth Amendment deprivation in taking Joe Hayes fingerprints (and there is not), then what facts support by a preponderance of the evidence inevitable discovery? At the hearing on the motion to suppress, there is uncontraverted testimony that Joe Hayes' herringbone pattern tennis shoes were seized in plain and open view from his front porch by police prior to formal arrest. J.A. 14; 21-22. This type of

shoe had left an impression at the rape scenes. J.A. 20. In his opinion, Judge Campbell points out:

> Initially, we note that even though the officers did not have a warrant, Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), does not apply here since the discussion about fingerprints and the seizure of the tennis shoes occurred on the front porch of appellant's home. Because the officers found the shoes on appellant's front porch, the trial court did not err in admitting the shoes into evidence. State v. Rickard, 420 So.2d 303 (Fla. 1982), demonstrates that these shoes clearly were not in a constitutionally protected area at the time the officers saw them and so were subject to seizure.
>
> (J.A. 34; 439 So.2d at 898)

Upon matching the seized shoes with the shoe prints left at the rape scenes, police would have had probable cause for arrest. Once arrested, Joe Hayes would have been fingerprinted pursuant to Florida booking procedures. At that point, any question about fingerprint identification is moot. Joe Hayes' tennis shoes had

been seen on his front porch one week before his fingerprints were solicited. This raised added suspicion focusing on him as the target. (State Court Record 500-501). At trial, the herringbone pattern tennis shoes matched the shoe print Joe Hayes left at Mrs. Hollander's residence at the time of the rape. (State Court Record 459-471). In fact, herringbone shoe prints were found at <u>all</u> rape scenes. J.A. 21. Putting Joe Hayes' fingerprints to the side, police had the following as pieces to the puzzle:
(1) the obsessive-compulsive behavior pattern evidenced by the similarities of the victims' house numbers, Joe Hayes' place of employment, and residence J.A. 16-17;
(2) a psychosexual aberration focusing on a marked preference for anal intercourse J.A. 21; (3) a dislike of older women J.A. 21; (4) a fear of younger women

J.A. 21; (5) composite picture of Joe Hayes gleaned from victims J.A. 14-15; (6) documents seized under court order from Joe Hayes' place of employment (care center) reflecting bizarre behavior and dislike of older women J.A. 10; 21; (7) police interviews with all rape victims (State Court Record 486); and, (8) the herringbone tennis shoes seen on Joe Hayes' front porch one week before fingerprint solicitation (State Court Record 500, 501) and when fingerprints were solicited. J.A. 21. Before securing Joe Hayes' fingerprints, police suggested they had probable cause to arrest. J.A. 22. Once police matched the shoe print to the shoe sole itself, there is no question but that fingerprints taken as part of the arrest/booking procedure would have been admitted at trial. This evidence would have been discovered in the same

condition by an independent line of investigation that was already being pursued.

United States v. Crews, 445 U.S. 463, 475-476 (1980) distinguishes Davis v. Mississippi, 394 U.S. 721 (1969) on this theory. In the case at bar (like Crews and unlike Davis) the criminal investigation had focused on the target and police had independent reasonable grounds to suspect his culpability. Irrespective of Joe Hayes' detention, his fingerprints would have been obtained. Justice Brennan in Crews, Id. at 470, fn 11 recognized the three exceptions to the exclusionary rule: (1) Nardone v. United States, 308 U.S. 338, 341 (1939), (attenuation); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (independent source); and, United States ex rel. Owens v. Twomey, 508 F.2d 858, 865 (7th Cir. 1974)

(inevitable discovery). Julianne Hollander's independent recollection of Joe Hayes antedates his detention. The in-court identification by the victim is admissible.

Thus, on alternate constitutional grounds, there exists a rationale not to apply the exclusionary rule. The fingerprint evidence, seen from this light, is constitutionally admissible under the inevitable discovery rule.

CONCLUSION

Upon this review of the applicable case law, Florida concludes as follows:

(1) There is a scarcity of cases where citizens are asked to consent to warrantless detentions so that their fingerprints might be lifted to be compared with those found at the crime scene. The facts are narrow; and, the holding of the Florida district court of appeals is restricted to them. It is not illogical for Florida to argue that Terry v. Ohio, 392 U.S. 1 (1968) be extended to permit such brief detentions. These narrow facts reflect such a minimal intrusion upon a citizen that there is no Fourth Amendment deprivation. To require, under these narrow facts, judicial authorization or approval at this investigatory stage would have a chilling effect on consensual encounters and reasonable detentions based

on articulable facts.

(2) There is no reasonable expectation of privacy in a citizen's fingerprints; nor, does the taking of impressions reflect a meaningful intrusion into Joe Hayes' possessory interests in his fingerprints. Fingerprints are nontestimonial.

(3) The detention of Joe Hayes is reasonable. He was detained no longer than necessary to complete the fingerprint match.

(4) On alternate constitutional grounds, Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984), sets forth an "inevitable discovery" exception to the exclusionary rule. In this case, the fingerprints would have been ultimately discovered. The purpose of this rule is to

bar setting aside convictions where police misconduct exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William I. Munsey, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Florida, Respondent herein, hereby certify that on December , 1984, pursuant to Rule 46.5, Rules of the Supreme Court, I served copies of the foregoing Brief for Respondent on Joe Hayes, Petitioner herein, by depositing such copies in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to the post office address of Michael E. Raiden, Esquire, the above-named Petitioner's counsel of record, at Office of the Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830.

All parties required to be served have been served. Dated December , 1984.

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OF COUNSEL FOR RESPONDENT